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HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

NO. 84

LOUIS H. NETZER,

Petitioner,

vs.

NORTHERN PACIFIC RAILWAY COMPANY,
a corporation,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR CERTIORARI

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OPINIONS BELOW

The opinion of the trial court (R. 327-331) was not reported. The opinion of the Supreme Court of the State of Minnesota (R. 333-344) is reported at 57 N. W. (2d) 247.

QUESTION PRESENTED

Was the petitioner (a car repairman) entitled to the protection of the Safety Appliance Act while engaged in repairing a freight car standing on a locked repair track in a repair yard devoted exclusively to the repair of bad order cars merely because the car contained an interstate shipment which had not yet reached its destination?

STATUTE INVOLVED

The statute involved is Sec. 11 of the Safety Appliance Act which provides in part as follows:

> "It shall be unlawful for any common carrier * * * to haul, or permit to be hauled or used on its line, any car * * * not equipped with * * * efficient hand brakes;" U. S. C. A. Title 45, Ch. 1, Sec. 11.

STATEMENT

This is a personal injury case. Petitioner, a car repairman employed by respondent, brought suit to recover damages for personal injuries sustained by him on December 25, 1948, when he fell from a brake platform of a box car at Missoula, Montana.

The car from which petitioner fell had been taken out of the train and was on a locked repair track undergoing repairs when the accident happened (R. 20, 34, 78). The car had a defective pair of wheels and petitioner and another car repairman, one Bailey, were directed to change the wheels. Bailey went under the car, and petitioner ascended the side ladder for the purpose of reaching the brake platform and was in the act of releasing the hand brake when he fell to the ground and was injured.

Petitioner had worked as a car repairman's helper and as step-up car repairman a total of six years and was familiar with hand brakes and the customary method and procedure of operating them (R. 42). Petitioner testified that when he reached the brake platform, he shoved over the release lever as far as it was intended to go (R. 43, 44). When the brake did not release, he attempted to work the brake wheel

in a clockwise direction to get it loose. It is often necessary to pull up on the brake wheel in this manner to cause a brake to release (R. 142, 166, 167, 214, 215). He then made two unsuccessful attempts to loosen the brake by pulling up on the brake wheel and was about to make a third attempt when suddenly the wheel spun and he fell from the platform to the ground (R. 44, 45).

All hand brake wheels spin when the brake is released, and this is a fact which the person operating such a brake will naturally anticipate. On the top of the box car, in the vicinity of the hand brake, a handhold was provided for the purpose of permitting a person attempting to release the brake to hold on with his left hand while operating the brake wheel with his right hand. Respondent contended that petitioner was himself negligent in not holding on to the handhold with his left hand and that if he had done so, the release of the brake and the spinning of the wheel would not have thrown him from the car. Respondent also contended that the brake was efficient and free from defects.

Shortly after the accident, the hand brake was inspected and operated by a number of persons familiar with hand brakes, all of whom testified that the brake was free from defects and operated efficiently and properly (R. 128, 170-172, 214, 231, 232, 254, 270, 271). In all, six foremen, car inspectors and car repairmen so testified.

Because the car was on a locked repair track and "not in use on its line," the trial court held as a matter of law that the Federal Safety Appliance Act was not violated, and refused to submit that issue to the jury. The Supreme Court of Minnesota affirmed this holding.

The case was submitted under the Federal Employers' Liability Act, and the questions of negligence and contributory negligence were given to the jury for its determination. The jury was instructed that the Railway Company was required to exercise ordinary care to see that its employee was furnished with a safe place in which to work and to exercise ordinary care to guard against defects or insufficiency of appliances (R. 299). The jury was also told that contributory negligence on the part of the petitioner would not bar a recovery, but, if present, would only diminish the damages in proportion to the amount of negligence attributable to the employee.

The verdict was in favor of respondent, and implicit in the verdict is the finding that the Railway Company was not negligent.

ARGUMENT

After a Defective Car Is Temporarily Removed from the Carrier's Line and Reaches the Place of Repair, the Provisions of the Safety Appliance Act Are Inapplicable.

The Safety Appliance Act, as amended in 1910, makes it unlawful for a common carrier "to haul, or permit to be hauled or used on its line, any car subject to the provisions of this Act not equipped with appliances" as provided therein. Whatever ambiguity may lurk in the phrase, "used on its line", it has been repeatedly held, with the tacit approval of this Court, that a car which has been withdrawn from a train and placed on a repair track for the purpose of

being repaired is not, *while undergoing repairs*, being "used on its line" within the meaning of the Act, and the defective or insecure condition of its appliances cannot be held to violate the Act.

New York, C. & St. L. R. Co. v. *Kelly* (CCA 7th), 70 F. 2d 548, certiorari denied 293 U. S. 595, 55 S. Ct. 110, 79 L. Ed. 689;

Sherry v. *Baltimore & O. R. Co.* (CCA 6th), 30 F. 2d 487, certiorari denied 280 U. S. 555, 50 S. Ct. 16, 74 L. Ed. 611;

Baltimore & O. R. Co. v. *Hooven* (CCA 6th), 297 F. 919;

McCalmont v. *Pennsylvania R. Co.* (CCA 6th), 283 F. 736;

Kaminski v. *Chicago M. St. P. & P. R. Co.*, 180 Minn. 519, 231 N. W. 189, certiorari denied 282 U. S. 872, 51 S. Ct. 78, 75 L. Ed. 770;

Compton v. *Southern Pac. Co.*, 70 Cal. App. 2d 267, 161 P. 2d 40;

Atlantic Coast Line R. Co. v. *Edge*, 81 Ga. App. 606, 59 S. E. 2d 533.

In *New York, C. & St. L. R. Co.* v. *Kelly*, 70 F. 2d 548, certiorari denied 293 U. S. 595, Kelly, a field brakeman in a yard crew, climbed upon a bad order car which had been removed from service and placed upon an established and segregated side track known as a repair track, for repair, and sustained injuries when he fell therefrom because of the absence of a handhold. The court held the Safety Appliance Act inapplicable upon the ground that the car was not "in use" within the meaning of the Act. It said, (p. 551):

> "Had the car in question been en route to the repair place, a different situation would have been presented, but after it reached the repair place, was out of service, the carrier was entirely within its rights in taking off

the handhold or any other of the safety appliances necessary to effect the repairs, without violating the Safety Appliance Act.

"Since it is so clear that the car was not in use, it was erroneous to submit the case to the jury; therefore it is unnecessary to consider the correctness of instructions under which it was sent to the jury."

In *Sherry* v. *Baltimore & O. R. Co.*, 30 F. 2d 487, certiorari denied 280 U. S. 555, the plaintiff was a car inspector employed by defendant, whose duty it was to inspect bad order cars, to make such repairs as could be made on the ground, or order a car to the repair shops for that purpose. He sustained injuries when he was thrown from a bad order car which had been cut from the train and placed upon one of the ladder tracks in the general yard while he was engaged in testing a brake on the car which had a badly bent brake staff. The court held the Safety Appliance Act inapplicable upon the ground that the defectively equipped car was not in use within the meaning of the Safety Appliance Act at the time of the injury to the plaintiff. The court said:

"In the instant case the defective car was not being hauled or used by the defendant, except in that it was stored temporarily upon one of the ladder tracks. It had been withdrawn from use for the very purpose of undergoing repair. No movement was immediately contemplated, and no action of setting the brakes was necessary, save as incident to inspection and repair. In *Chicago G. W. R. R. Co.* v. *Schendel*, cited supra in the note, the car was being placed upon a siding for the purpose of withdrawing it from use, but the Supreme Court specifically states that the use, movement, or hauling of the defective car, within the meaning of the statute, had not ended at the time of the accident. In *Texas*

& Pacific Ry. v. *Rigsby*, 241 U. S. 33, 42, 36 S. Ct. 482, 60 L. Ed. 874, the Supreme Court also refers to the question of use, and as pointed out in the McCalmont Case (page 739), this decision must be interpreted as based upon the theory that the taking of 'bad order' cars to the shops for repair is a 'part of the unitary journey of the car from the point of first discovery to the precise point of actual repair,' and therefore within the provision for continuance of civil liability under 45 U. S. C. § 13 (45 USCA § 13). *In none of the cases cited was liability held to attach after withdrawal from service had been completed and during the course of repair.*" (p. 489) (Emphasis supplied)

In *Baltimore & O. R. Co.* v. *Hooven*, 297 F. 919, the plaintiff, a machinist employed in defendant's roundhouse, was injured after making minor adjustments on top of the boiler of a locomotive temporarily withdrawn from service and undergoing minor repairs in the roundhouse in preparation for an early return to service, when he slipped and fell from the end of the steel runningboard because of the presence of oil thereon. The court held the Safety Appliance Act inapplicable upon the ground that, without stopping to consider whether a locomotive is a car within the meaning of the Safety Appliance Act, it is not the intent of the Act to have the absolute liability which it imposes attach to the vehicle "during such time as it is withdrawn temporarily from actual service and after it has reached the place of repair and is undergoing conditioning and repair for the purpose for which it is intended and for the use to which it is assigned."

In *McCalmont* v. *Pennsylvania R. Co.*, 283 F. 736, a car which had just been loaded for outbound shipment was found

to have at one end a coupler so defective that it would not work without repairs which could only be made at the shop. It was accordingly switched onto a track devoted wholly to use as a dead or storage track for the temporary holding of bad order cars which had to go to the shop for repairs. Plaintiff, a foreman of car inspectors for the defendant, was killed when he went under the car in order to adjust a chain coupling by which it had been attached to another car. The court held the Safety Appliance Act inapplicable upon the ground that "the car was wholly out of present use". It said:

> "In the present case no hauling was in progress or in immediate contemplation. The car was wholly out of present use. The original putting on of the chain and the further adjustment of the chain were in the nature of temporary repairs which would permit the car to be taken to the shop. and, so long as work of this character is not done as a part of the immediate operation of hauling to the shop, it does not seem important whether the expected interval before hauling is a few hours or a much longer time." (p. 739)

The holding of the Sixth and Seventh Circuits in *Baltimore & O. R. Co.* v. *Hooven* (CCA 6th), 297 F. 919, and *New York, C. & St. L. R. Co.* v. *Kelly* (CCA 7th), 70 F. 2d 548, was recognized by this Court and cited with apparent approval in *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10, 13. In that case Mr. Chief Justice Hughes, speaking for the Court, said:

> "The car had been brought into the yard at Granite City and placed on a receiving track temporarily pending the continuance of transportation. If not found to be defective, it would proceed to destination; if found defective, it would be subject to removal for repairs. *It is not a case where a defective car has reached a place of*

repair. See *Baltimore & Ohio R. Co.* v. *Hooven*, 297 Fed. 919, 921, 923; *New York, C. & St. L. R. Co.* v. *Kelly*, 70 F. (2d) 548, 551." (Emphasis supplied)

Another case in line with the above decisions is *Lyle* v. *Atchison, T. & S. F. Ry. Co.* (C. A. 7th), 177 F. 2d 221, certiorari denied 339 U. S. 913. In that case the locomotive involved had reached the roundhouse and had been turned over to plaintiff, a hostler's helper, for servicing with sand, water, fuel, oil, etc. After he had serviced the engine, plaintiff was injured while descending a ladder running from the top of the tender to the deck of the locomotive cab. Plaintiff sued to bring his case within the purview of the Boiler Inspection Act, 45 U. S. C. A. § 23, which contains language similar to that used in the Safety Appliance Act. Judgment was entered in favor of the plaintiff in the District Court but was reversed in the Court of Appeals, the latter court holding that the locomotive was not being "used" at the time of the injury. In the course of its opinion the Court of Appeals said:

> "Liability under the Act in question, like that under the Safety Appliance Act, 45 U.S.C.A. § 1 et seq., depends not upon negligence but is an absolute one to obey the statutory requirements. For this reason Congress, obviously, in framing each of the Acts, in consideration of the unconditional duty to have cars and locomotives in such condition as not to put in peril life or limb while in use imposed upon the carrier, likewise limited the absolute liability to cars and locomotives while in use 'on the line.' In other words, when a locomotive or car is in 'use on the line,' the mandatory duty of the carrier attaches and when the car or engine is not so in use then the duty under the express provision of the statute does not exist." (p. 222).

The specific question in the case at bar is whether or not a freight car removed from service to the extent that it is taken out of one of respondent's trains and put on the repair track for specified repairs is still "in use" within the meaning of the Safety Appliance Act. The foregoing cases clearly and unequivocally hold that such a car is not "in use" and the existence of defective or insecure appliances thereon does not violate the Act. Petitioner's counsel has failed to cite one single federal or state case which holds to the contrary.

The Fact That the Freight Car Involved in this Case Contained an Interstate Shipment Which Had Not Yet Reached Its Destination Is Wholly Immaterial.

Conceding that the car involved in this case was in interstate commerce because still loaded with an interstate shipment which had not yet reached its destination, that fact is entirely immaterial.

The statutory provision is: "It shall be unlawful * * * to haul, or permit to be hauled or used on its line, *any car*" not equipped with certain named safety appliances in good order. The Safety Appliance Act applies to all cars, interstate or intrastate, loaded or empty, and whether they be owned by respondent railroad or another when they are being hauled or used on its line. *Southern Ry. Co.* v. *United States*, 222 U. S. 20; *Texas & Pacific Ry. Co.* v. *Rigsby*, 241 U. S. 33; *Baltimore & O. R. Co.* v. *Hooven* (CCA 6th), 297 F. 919, 921.

In *Baltimore & O. R. Co.* v. *Hooven, supra,* the court said:

> "It must be borne in mind that the test of liability for injuries proximately resulting from a violation of the Safety Appliance Act is not the engagement of the

vehicle in interstate commerce, and the right of a private individual to recover for an injury resulting from a violation of this act is also not determined by the fact that at the time of injury such person was or was not engaged in interstate commerce. * * *

"The applicability of the act in specific instances and its constitutionality have been placed on broader ground than this, and the act is applicable to *all vehicles used on any railroad which is a highway of interstate commerce, whether the vehicles themselves are engaged in interstate commerce or not.* * * *

"*In actions under the Safety Appliance Act the statutory criterion is whether the car is 'in use' 'on its line,'* * * *" (p. 921) (Emphasis supplied)

The rule is clearly stated by this Court in *Brady* v. *Terminal R. R. Assn.*, 303 U. S. 10, 15, where this Court said:

"The breadth of the statutory requirements is shown by the fact that it embraces all locomotives, cars and similar vehicles used on any railway that is a highway of interstate commerce and is not confined exclusively to vehicles engaged in such commerce."

The obvious purpose of the Congress in wording the Act as it did was to be sure that it covered all cars while they were being hauled or used on the line. A defective brake on an empty car or on a car moving between two cities or towns within the same state is just as dangerous to an employee having to operate the brake as a defective brake on a car moving in interstate commerce. The statutory test is not whether the car was in interstate commerce but whether it was being "hauled or used on its line."

The Act is mandatory and makes the carrier absolutely liable for the death or injury of any railroad employee

caused by reason of the use or hauling on its line of any car with safety appliances which are defective or insecure or which are not maintained in accordance with the requirements of the Act. Accordingly, Congress in framing the Act limited the absolute liability to cars and locomotives while in actual use on the carrier's line. In other words, when a car is in "use on the line", the mandatory duty and absolute liability of the carrier attach, and when the car is not in use, then the duty, under the express provision of the statute, does not exist. The Congress realized that appliances do wear out so that they must be repaired, and that the railroad company should have an opportunity to make repairs without being subject to absolute liability. The repairing of safety appliances on a car which has been removed from the line and placed upon a repair track, is, therefore, not a "use" of the car on the carrier's line but is an act in compliance with, and not in violation of, the law. *Lyle* v. *Atchison, T. & S. F. Ry. Co.* (C. A. 7th), 177 F. 2d 221, certiorari denied 339 U. S. 913.

It is pertinent to note that in Sec. 13 of the Act (45 USCA § 13) Congress exempted the carriers from statutory criminal penalties while a defective car was being hauled from a place on the line where the defect was discovered to the place of repair. However, it specifically provided that such movement or hauling of the car was at the sole risk of the carrier in so far as any remedial action for the death or injury of any railroad employee is concerned. No similar provision covering a defective car after it had reached the place of repair can be found in the law. This omission is indicative of the intent of Congress to exempt the carrier from the provisions of the Act after the car had reached the place of repair. *New York, C. & St. L. R. Co.* v. *Kelly*, 70 F. 2d 548, certiorari denied 293 U. S. 595.

Cases Arising Under the Safety Appliance Act Should Not Be Confused With Those Arising Under the Federal Employers' Liability Act.

The case at bar was submitted to the jury under the provisions of the Federal Employers' Liability Act (R. 297), and while respondent contended that it was free from negligence, it at no time challenged the applicability of that Act. In fact, respondent admitted in its answer that petitioner was employed in interstate commerce (Paragraph III of Complaint admitted by Paragraph I of Answer, R. 1, 5). Prior to the 1939 amendment of the Federal Employers' Liability Act, it was necessary for a railway employee to bring himself within the "moment of injury rule" before he could claim the benefit of the Federal Employers' Liability Act. The test was whether or not at the time of the injury, the employee was engaged in interstate transportation or in work so closely related to it as to be practically a part of it. *Shanks* v. *Del., Lack. & West. R. R.*, 239 U. S. 556; *Chi., Burlington & Q. R. R.* v. *Harrington*, 241 U. S. 177, and *So. Pac. Co.* v. *Industrial Accident Comm.*, 251 U. S. 259.

Petitioner's counsel has cited a great many cases arising under the Federal Employers' Liability Act where the issue was whether or not the plaintiff was engaged in interstate commerce at the time of the accident so as to be entitled to the benefits of that Act. Those cases are not in point here and counsel's citation of them only tends to confuse.

Counsel also cites *Minneapolis, St. P. & S. Ste. M. R.* v. *Goneau*, 269 U. S. 406; *Great Northern Ry. Co.* v. *Otos*, 239 U. S. 349; *Delk* v. *St. Louis & San Francisco R. R.*, 220 U. S. 580; *Chicago, M. & St. P. Ry. Co.* v. *Voelker* (8 Cir.), 129 F.

522; *Erie R. Co.* v. *Russell* (2 Cir.), 183 F. 722; *Cusson* v. *Canadian Pac. Ry. Co.* (CCA 2nd), 115 F. 2d 430, and *New Orleans & N. E. R. Co.* v. *Jackson*, 140 Miss. 375, 105 So. 770, in which the Safety Appliance Act was held applicable, but in none of them had the defective car reached the repair track. They relate to accidents which occurred while the car was being switched in the yards, while it was stopped on the mainline, while it was in the process of being removed to a repair track, or while it was standing on a siding as distinguished from a repair track. These cases are inapposite.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The decision of the Supreme Court of Minnesota is clearly right. It adopted and followed the interpretation of the Safety Appliance Act which has been enunciated by the courts since the effective date of the Act. If the Act is now to be enlarged so as to cover appliances on bad order cars which have reached the repair track and are undergoing repairs, that change should be made by the Legislature rather than the Court.

2. There is no conflict of decision. All of the cases which we have been able to find, both state and federal, hold the Safety Appliance Act inapplicable under similar facts. Petitioner has cited no case to the contrary.

3. There is no important question of Federal law. Since the enactment of the Act on April 14, 1910 (c. 160, § 2, 36 Stat. 298), the Federal courts, without exception, have held that after a defective car reaches a place of repair, the Safety

Appliance Act is not applicable for the car is not then "in use on its line." This interpretation is fair and just for it permits the railroad to comply with the law by repairing its cars without being held as an insurer of the safety of its employees.

4. Petitioner was denied no federal right. His case was submitted to the jury under the provisions of the Federal Employers' Liability Act and his rights under that Act were clearly and fully explained to the jury by the trial court. Under the facts of his case, he was not entitled to any rights under the Safety Appliance Act.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

Respectfully submitted,

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August 7, 1953.